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Opinion following remittitur recall

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVIS SALARY, Defendant and Appellant.	G055407 (Super. Ct. No. 17NF0210) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert C. Gannon, Judge. Affirmed in part and remanded.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

A jury convicted Davis Salary of assault with a deadly weapon and battery causing serious injury, and found great bodily injury, deadly weapon and prior conviction allegations to be true. Salary appealed, and his appointed counsel filed a brief under the procedures outlined in *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*).[1] Salary filed a supplemental brief. Because our review of the record disclosed no arguable issues, we affirmed the judgment.

Subsequently, appointed counsel filed a motion to recall the remittitur to address Salary's sentencing in light of Senate Bill No. 1393 (2017-2018 Reg. Sess.; Stats. 2018, ch. 1013 (SB 1393)), which, effective January 1, 2019, amends Penal Code sections 667 and 1385 to provide trial courts with discretion to strike or dismiss a section 667 prior serious felony conviction enhancement. Counsel noted that Salary's 12-year sentence included a five-year enhancement under Penal Code section 667, subdivision (a). We granted the motion, vacated our prior opinion, and reinstated the appeal. In our order granting Salary's motion to recall the remittitur, we stated: "Either party may file a supplemental letter brief . . . If appellant does not file a supplemental brief, the court will deem the argument included in pages 3 to 9 of his motion to recall the remittitur as his supplemental brief. If respondent does not file a supplemental brief, it will be deemed a concession on the issue of whether the appellant is entitled to resentencing under Penal Code section 6[6]7, subdivision (a), subsection (1)." No party filed a supplemental brief.

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[1] Counsel filed a declaration stating she thoroughly reviewed the record in this case, as did an attorney at Appellate Defenders, Inc. Counsel advised Salary she was filing a brief on his behalf per the procedures outlined in *Wende*, *supra*, 25 Cal.3d 436 and *Anders*, *supra*, 386 U.S. 738. She provided Salary with a copy of the brief and informed him he personally could file a supplemental brief raising any points he wished to call to this court's attention. She made a copy of the record available to Salary. Counsel advised Salary he could request her withdrawal as counsel, and she would move to be relieved upon his request.

We will affirm the convictions, but remand the matter so the trial court may consider whether to strike or dismiss the Penal Code section 667, subdivision (a), enhancement.

I

FACTS AND PROCEDURAL HISTORY

An information filed in March 2017 alleged Salary committed assault with a deadly weapon using a stabbing instrument (Pen. Code, § 245, subd. (a)(1) [count 1]; all statutory citations are to the Penal Code unless otherwise indicated) and battery causing serious bodily injury (§ 243, subd. (d) [count 2]) against Albert C. in January 2017. The information also alleged Salary inflicted great bodily injury as to count 1 (§ 12022.7, subd. (a)(1)), and personally used a deadly weapon as to count 2 (§ 12022, subd. (b)(1)). Finally, the information alleged Salary had suffered prior serious felony convictions for assault with a deadly weapon and active gang participation (§ 186.22, subd. (a)) in January 2011 (§§ 667, subds. (a)(1) [five-year enhancement], (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A) [Three Strikes law]), and served several separate prison terms within the meaning of section 667.5.

At trial, Darryl P. testified he managed a two-building, two-story Anaheim storage facility in January 2017. Albert C. rented two storage units at the facility, including a drive-up unit on the ground floor of Building A. Salary rented an upstairs unit in Building B.

Albert C., a physically large man, testified he met Salary for the first time in late December 2016. On that occasion, he agreed to give Salary a ride to Riverside County where Salary had a female friend. The men shared a motel room and used drugs.

Salary agreed to reimburse Albert $40-50 for gasoline, drugs and other expenses related to the trip. When Salary failed to repay him, Albert took some property that Salary left outside of his storage unit. Albert intended to hold it until Salary repaid the loan.

On January 6, 2017, Salary came up to Albert at the storage facility and asked for some marijuana. Salary noticed his property in the back of Albert's truck, asked for it back, and called Albert a "peseta."

Albert angrily left the facility and found a person – referred to at trial as "Robert" or "Stranger" who confirmed "peseta" was a derogatory term. Albert and Robert returned to the facility and went upstairs to Salary's storage unit. Albert denied having a weapon, but noticed Robert held a folding buck knife at his side. Albert kept the knife in his truck and used it for work, and Robert had taken it without his knowledge. Albert told Robert to put the knife away.

Albert denied any physical altercation at this point, but he was in "an antagonistic mood" and he and Salary exchanged insults. Albert took more of Salary's property and taunted him to "come get it."

Albert went back downstairs with Salary saying, "Give me my stuff. Give me my stuff." Albert tossed Salary's property into his storage unit or his truck, and tried to calm down. A short time later, Salary snuck up from behind Albert as he stood by his truck and stabbed him in the right shoulder or back area. After a brief skirmish, Salary departed.

Robert drove Albert to the hospital, where he spent four days with a collapsed lung. Albert told an officer at the hospital he was angry at Salary because he only gave him $13.

Officer Harris arrested Salary and discovered a pair of scissors on his person. The officer provided a *Miranda* (*Miranda* v. *Arizona* (1966) 384 U.S. 436) advisement and interviewed Salary, who denied stabbing anybody, but did see a fight "between some big, big guy with a big truck" and two or three others. The big guy was a "bad guy" and "kind of a bully." Salary claimed he did not see any weapons, and left immediately with his mother when the men got into a scuffle.

The parties stipulated a physician would testify he observed a stab wound to Albert's right upper back and shoulder, Albert suffered a collapsed lung as a result of the stabbing, Albert admitted to hospital staff he had consumed methamphetamine the day before the incident, and his blood tested positive for the substance.

Salary testified he ran a business reselling merchandise he acquired from various Internet sites. He gave Albert gas money for the 50-mile roundtrip and he paid for food, hotel and other items, and admitted he smoked some of Albert's methamphetamine.

Two days before the incident, he offered Albert another $20 hoping he would stop harassing him. Albert took the money, but acted like he did not want it. On the day of the incident, Salary noticed his property in the back of the truck and asked Albert to return the items. Albert went into a "psychotic mode," used profanity, and told Salary "you fucking didn't pay me." Albert grabbed an antique brass lamp belonging to Salary, bent the metal, and threw it at him. Salary told him to "just keep the stuff, man." As Salary walked away, Albert called him names including "lame, a bitch, a coward . . . ." Salary called Albert a "peseta."

Albert said he was going to "call a homie" to find out what "peseta" meant, and "if it means what" he thought it meant "[i]t's on." Salary decided to pack up his "stuff and get out of Dodge."

Less than 10 minutes later, Salary was inside his storage unit and heard footsteps. He poked his head out and saw Robert calmly playing with a knife like a yo-yo. Robert said "what's up." Albert appeared wearing gloves and wielding a large kitchen-type knife. Salary was "spooked" and asked if the men were going to "jump" him. Albert took plastic baskets containing merchandise, including Salary's cell phone and paperwork belonging to Salary's mother, and said "[t]his is my shit now." He put his knife in the basket and walked away. Albert told Robert "[h]old him here. I will be back as soon as I find it."

Fearful about getting away, Salary grabbed a pair of scissors and "put them up." Robert backed up, and Salary walked out of his locker. He asked Robert about getting his phone back, but Robert said "[t]hat's the least of your worries," and said Albert was "coming back."

Salary was afraid of what Albert would do when he returned, and sought to "make an escape . . . out of that hallway, [and] potential deathbed of [his] storage" unit. When he got downstairs, he saw or heard Albert fumbling for something in his truck, thought Albert was "coming back for" him, and was "smelling death." He "was in extreme panic mode" when he ran over and confronted Albert, and demanded that Albert return his phone. Albert turned his back and "went to the basket" where he had placed the knife. Worried that Albert was trying to grab his knife, Salary grabbed the scissors from his pocket and stabbed Albert. Albert came at him and flung "a metal pole or something" at him. He fled and hid in bushes until he was confident Albert was not returning, then returned and secured his storage unit. Salary did not initially run away because the pedestrian gate to the facility "sometimes . . . gets stuck." He lied to Officer Harris because he feared retaliation by Albert and his associates.

Following trial in June 2017, the jury convicted Salary of the charges and found the great bodily injury and deadly weapon enhancements to be true. Salary waived his right to a jury trial on the prior conviction allegations, and the court found them to be true.

On August 31, 2017, the date set for sentencing, the court denied Salary's motion for new counsel (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)). The court imposed a 12-year prison term, comprised of the two-year low term for assault with a deadly weapon doubled to four years under the Three Strikes law, a three-year great bodily injury enhancement, and a five-year serious felony enhancement. The court stayed (§ 654) or struck (§ 1385, subd. (c)) punishment for the battery conviction and other enhancements.

II

DISCUSSION

A. *No Arguable Issue Exists*

Following *Wende* guidelines, we have reviewed counsel's brief and the appellate record. To assist the court in its review, counsel identified two issues for our consideration: Whether there was sufficient evidence disproving Salary reasonably believed he faced imminent danger of bodily injury, and disproving he used reasonable force against Albert.

Salary has filed a supplemental brief. (*People v. Kelly* (2006) 40 Cal.4th 106.) He first asserts the evidentiary stipulation concerning Albert's treating physician's testimony was a "slow plea" requiring advisements pursuant to *Bunnell v. Superior Court* (1975) 13 Cal.3d 592 (*Bunnell*). As noted above, the parties stipulated the physician would testify he observed a stab wound to Albert's right upper back and shoulder, and Albert suffered a collapsed lung as a result of the stabbing.

A "'slow plea'" is "'an agreed-upon disposition of a criminal case via any one of a number of contrived procedures which does not require the defendant to admit guilt but results in a finding of guilt on an anticipated charge and, usually, for a promised punishment.' Perhaps the clearest example of a slow plea is a bargained-for submission on the transcript of a preliminary hearing in which the only evidence is the victim's credible testimony, and the defendant does not testify and counsel presents no evidence or argument on defendant's behalf. Such a submission is 'tantamount to a plea of guilty' because 'the guilt of the defendant [is] apparent on the basis of the evidence presented at the preliminary hearing and . . . conviction [is] a foregone conclusion if no defense [is] offered.'" (*Bunnell, supra,* 13 Cal.3d at p. 602.) The *Bunnell* slow plea doctrine applies when there is a "submission," meaning "when a defendant gives up his right to trial by jury and, unless otherwise specified, the right to present additional evidence in his own

defense and agrees the court can decide the case on the basis of the transcript of prior proceedings." (*People v. Robertson* (1989) 48 Cal.3d 18, 39-40.)

Evidentiary stipulations have long been recognized as tactical trial decisions which counsel has discretion to make without the client's express authority. (*People v. Adams* (1993) 6 Cal.4th 570, 578.) A factual stipulation for the jury's consideration does not constitute a slow plea requiring advisements. (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 747.) Salary's stipulation concerning the physician's testimony did not admit "every fact necessary to imposition of the additional punishment" and therefore did "not have the definite penal consequences necessary to trigger the *Boykin-Tahl* requirements." (*People v. Adams* (1993) 6 Cal.4th 570, 580.) The jury in this case was required to determine based on the stipulated testimony and other evidence, including Albert's testimony concerning his injuries and hospitalization and photographs, whether Salary personally inflicted great bodily injury on Albert when he assaulted him. The record is clear the court was not required to provide constitutional advisements before accepting the stipulation. Salary's claim does not raise an arguable issue.

Salary also suggests the trial court erred by failing to instruct the jury on the doctrine of "mutual combat." (CALCRIM No. 3471.) CALCRIM No. 3471 provides: "A person who (engages in mutual combat/ [or who] starts a fight) has a right to self-defense only if: [¶] 1. (He/She) actually and in good faith tried to stop fighting; [AND] [¶] 2. (He/She) indicated, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wanted to stop fighting and that (he/she) had stopped fighting(;/.) <*Give element 3 in cases of mutual combat.*> [AND [¶] 3. (He/She) gave (his/her) opponent a chance to stop fighting.] [¶] If the defendant meets these requirements, (he/she) then had a right to self-defense if the opponent continued to fight. [¶] [However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from

the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting(,/ or) communicate the desire to stop to the opponent[, or give the opponent a chance to stop fighting].] [¶] [A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.]"

Neither side objected when the trial court stated neither party requested CALCRIM No. 3471, and it was not inclined to give the instruction. There was no evidence in this case Salary and Albert began or continued to fight by mutual consent or agreement. (See *People v. Ross* (2007) 155 Cal.App.4th 1033, 1047 [must be evidence from which the jury could reasonably find both combatants actually consented or intended to fight before the claimed occasion for self-defense arose].) The instruction had no application.

Salary also asserts "the court abused its discretion under Evidence Code section 356 by excluding [his] exculpatory statements not in their entirety [] when offered for the truth of matter." In his trial brief, the prosecutor moved to exclude "out-of-court statements made by the defendant if offered by the defense as hearsay without a proper exception." During pretrial discussions, the court and counsel addressed the motion and Salary's post-*Miranda* statements. Defense counsel agreed the hearsay rule generally precluded him from eliciting Salary's exculpatory out-of-court statements. The court stated it was "well aware of [Evidence Code section] 356. And if you get a portion of it in, generally speaking, I'm inclined to let everything in so the jury can hear both sides, okay? [¶] All right. Well, in any event, I'm granting that motion as far as it is a motion to preclude hearsay statements of defendant."[2] Salary does not identify any admissible statements excluded by the court. His claim does not raise an arguable issue.

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[2] Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject

Salary asserts "whether, through a claim of [ineffective assistance of counsel], a defendant can bring a *Trombetta/Youngblood* claim for failure to preserve exculpatory evidence. The case at bar deals with the failure [] to preserve potentially exculpatory video footage at the storage facility [] similar to *People v. Alvarez* (2014) 229 Cal.App.4th 761 (*Alvarez*)." Salary apparently refers to video footage from the upstairs camera that the storage company erased at some point after the incident. According to the facility's manager Darryl, the upstairs hallway in Building B had a single camera. Darryl told a police officer the facility saved video footage for 30 days. The officer only asked for footage depicting the driveway and did not ask to see upstairs footage. Sometime after the incident, the facility installed a new camera system and footage from the upstairs camera was erased and unavailable at the time of trial.

Nothing in the record suggests the government or defense counsel was made aware of the potential relevance of the upstairs footage before it was erased. In his statement to the police officer two weeks after the incident, Salary generally denied involvement in the stabbing and did not mention any antecedent incident upstairs. Defense counsel subpoenaed the storage facility video when he became aware of the issue, but the footage apparently had been erased. This case bears no resemblance to *Alvarez*, where the defendant asked the senior officer at the scene to check any relevant video, the officer assured him this was "part of [his] job" (*Alvarez*, *supra*, 229 Cal.App.4th at p. 769), but later admitted he did not review the video or ask anyone else to do so. The appellate court concluded the government's bad faith failure to retain potentially material and exculpatory evidence constituted a due process violation warranting dismissal.

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may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

Finally, Salary suggests the trial court had a sua sponte duty to instruct with CALCRIM No. 3475: "The (owner/lawful occupant) of a (home/property) may request that a trespasser leave the (home/property). If the trespasser does not leave within a reasonable time and it would appear to a reasonable person that the trespasser poses a threat to (the (home/property)/ [or] the (owner/ [or] occupants), the (owner/lawful occupant) may use reasonable force to make the trespasser leave. [¶] *Reasonable force* means the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave. [¶] [If the trespasser resists, the (owner/lawful occupant) may increase the amount of force he or she uses in proportion to the force used by the trespasser and the threat the trespasser poses to the property.] [¶] When deciding whether the defendant used reasonable force, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant used more force than was reasonable. If the People have not met this burden, you must find the defendant not guilty of <*insert crime*>." Salary does not explain how this statement of the law applied to his case. Salary's defense was not that he used reasonable force to eject a trespassing Albert from his storage unit, but that Salary reasonably believed he was imminent danger of bodily injury, and used reasonable force against Albert in defending himself and his personal property. The jury was instructed on these subjects. (CALCRIM Nos. 3470 [right to self-defense], 3476 [right to defend personal property]; see also CALCRIM Nos. 3472 [self-defense may not be contrived], 3474 [defense ends when danger no longer exists].)

Our review of the entire record, including the matters identified by counsel, does not show the existence of an arguable issue. (*Wende*, *supra*, 25 Cal.3d at pp. 442-443.) Consequently, we affirm the convictions. (*Wende*, *supra*, 25 Cal.3d at p. 443.)

B. *Remanded for Resentencing*

The trial court imposed one five-year enhancement pursuant to section 667, subdivision (a). At the time the trial court sentenced Salary, section 1385 did not authorize a trial court to strike or dismiss a section 667 prior serious felony conviction enhancement. (§ 1385, subd. (b); Stats. 2014, ch. 137, § 1; see also *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045-1047 [rejecting claim that section 1385 unconstitutionally infringed on power of sentencing court to strike section 667 conviction enhancement].) Effective January 1, 2019, however, SB 1393 amends sections 667 and 1385, deleting the provisions in those statutes which prohibited a trial judge from striking a section 667 prior serious felony conviction enhancement in furtherance of justice. (Stats. 2018, ch. 1013, §§ 1-2.)

Citing *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), Salary contends SB 1393 applies to him because his judgment is not yet final. He argues this court should remand his case to permit the trial court to consider whether to exercise its newly-granted discretion to strike or dismiss his prior serious felony conviction enhancements. In declining to file a supplemental brief, the Attorney General concedes that remand is necessary so the trial court can exercise its discretionary authority under the new legislation.

We agree with the parties. Under *Estrada*, absent evidence to the contrary, we presume the Legislature intended a statutory amendment reducing punishment to apply retroactively to cases not yet final on appeal. (*Estrada, supra*, 63 Cal.2d at pp. 747-748; accord, *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) Remand is appropriate.

III

DISPOSITION

The convictions are affirmed, and the matter is remanded to allow the trial court to consider whether to strike or dismiss the section 667, subdivision (a), enhancement pursuant to section 1385, as amended by Senate Bill No. 1393.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.